

## Applicant Details

First Name	Justin
Last Name	Korman
Citizenship Status	U. S. Citizen
Email Address	<a href="mailto:jsk10002@nyu.edu">jsk10002@nyu.edu</a>
Address	<div>Address</div> <div>Street</div> <div>110 West 3rd Street, 1503</div> <div>City</div> <div>New York</div> <div>State/Territory</div> <div>New York</div> <div>Zip</div> <div>10012</div> <div>Country</div> <div>United States</div>
Contact Phone Number	8144045368

## Applicant Education

BA/BS From	Pennsylvania State University- University Park
Date of BA/BS	May 2021
JD/LLB From	New York University School of Law <a href="https://www.law.nyu.edu">https://www.law.nyu.edu</a>
Date of JD/LLB	May 22, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Annual Survey of American Law
Moot Court Experience	No

## Bar Admission

## Prior Judicial Experience

Judicial Internships/ Externships	No
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Post-graduate Judicial Law Clerk      **No**

### **Specialized Work Experience**

### **Recommenders**

Bharara, Preet  
pb132@nyu.edu;preetbharara@gmail.com

Rascoff, Samuel  
samuel.rascoff@nyu.edu  
(212) 992-8907

Been, Vicki  
vicki.been@nyu.edu  
212-998-6223

Satin, Russell  
Russell.Satin@ag.ny.gov

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Justin Korman  
110 West 3rd Street, Apt. 1503  
New York, NY 10012  
814.404.5368  
jsk10002@nyu.edu

June 12, 2023

The Honorable Kenneth M. Karas  
United States District Court  
Southern District of New York  
The Hon. Charles L. Brieant Jr. Federal Building and United States Courthouse  
300 Quarropas St., Courtroom 521  
White Plains, NY 10601-4150

Dear Judge Karas:

I am a rising third-year law student at the New York University School of Law and an Articles Editor of the *Annual Survey of American Law*. I am writing to apply for a clerkship for the 2025-2026 term or any subsequent term. I am interested in a clerkship in your chambers because of your time as an Assistant United States Attorney, a career I would like to pursue.

Enclosed are my resume, law school transcript, writing sample, and four letters of recommendation. My writing sample, which was prepared for a law school class, analyzes the constitutionality of warrantless long-term pole camera surveillance in the wake of the Supreme Court's decision in *Carpenter v. United States*.

The following individuals have submitted letters of recommendation on my behalf: Professor Vicki L. Been (917.860.1983), New York University School of Law; Professor Preet Bharara (preetbharara@gmail.com), New York University School of Law; Professor Samuel J. Rascoff (917.861.3019), New York University School of Law; and Mr. Russell Satin (203.948.4972), Office of the New York State Attorney General. I took classes with Professors Been, Bharara, and Rascoff, and Mr. Satin supervised my spring internship in the A.G.'s Office.

Please contact me with any questions, and thank you for your consideration.

Respectfully,

/s/ Justin Korman

Justin Korman

## JUSTIN S. KORMAN

110 West 3rd Street, Apt. 1503, New York, NY 10012  
(814) 404.5368 | jsk10002@nyu.edu

### EDUCATION

#### **NEW YORK UNIVERSITY SCHOOL OF LAW**, New York, NY

J.D. Candidate, May 2024

Unofficial GPA: 3.76

Honors: Florence Allen Scholar (Top 10% of class after four semesters)

Activities: *Annual Survey of American Law*, Articles Editor  
Prosecution Legal Society, President Emeritus

#### **THE PENNSYLVANIA STATE UNIVERSITY**, University Park, PA

B.A., Journalism, *summa cum laude*, with minors in History and Political Science, May 2021  
(Completed in six semesters)

Honors: Presidential Leadership Academy

Activities: Penn State Women's Volleyball, Student-Manager  
The Lion 90.7fm, Radio Show Host

### EXPERIENCE

#### **QUINN EMANUEL URQUHART & SULLIVAN, LLP**, New York, NY

*Summer Associate*, May 2023 - July 2023

#### **NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL**, New York, NY

*Law Student Extern*, January 2023 - April 2023

Summarized research on open legal questions and made recommendations for Assistant Attorneys General in the N.Y. Attorney General's Public Integrity Bureau. Assisted active investigations by reviewing bank records and electronic communications and assessing their pertinence.

#### **UNITED STATES ATTORNEY'S OFFICE**, Brooklyn, NY

*Law Student Extern*, September 2022 - December 2022

Prepared a prosecution memorandum, pretrial brief, and sample direct examination for Assistant U.S. Attorneys in the Eastern District of New York. Transcribed and summarized witness interviews in the lead up to a multidefendant criminal trial. Attended trial preparation meetings.

#### **UNITED STATES ATTORNEY'S OFFICE**, Harrisburg, PA

*Law Student Intern*, May 2022 - August 2022

Researched discrete legal issues related to venue, hearsay, confessions, witness competency, marital privileges, and the Speedy Trial Act for Assistant U.S. Attorneys in the Middle District of Pennsylvania. Drafted pretrial and post-conviction briefs, including for the Third Circuit.

#### **STATE COLLEGE AREA HIGH SCHOOL**, State College, PA

*Girls' Basketball Coach*, August 2018 - March 2021

Instructed student-athletes on the fundamentals of the sport. Designed daily practice plans and made in-game personnel adjustments. Built lineup evaluation metrics using data analytics.

Name: Justin S Korman  
 Print Date: 06/08/2023  
 Student ID: N18221719  
 Institution ID: 002785  
 Page: 1 of 1

New York University  
 Beginning of School of Law Record

Fall 2021

School of Law  
 Juris Doctor  
 Major: Law

Intelligence: Law, Strategy, Ethics Seminar LAW-LW 10439 2.0 A  
 Instructor: Samuel J Rascoff  
 Constitutional Law LAW-LW 11702 4.0 A  
 Instructor: Maggie Blackhawk  
 The Elements of Criminal Justice Seminar LAW-LW 12632 2.0 A  
 Instructor: Preet Bharara  
 Government Anti-Corruption Externship LAW-LW 12769 3.0 A  
 Instructor: Rachel Salem Pauley  
 Government Anti-Corruption Externship Seminar LAW-LW 12770 2.0 A  
 Instructor: Rachel Salem Pauley  
 Jennifer Rodgers

School of Law  
 Juris Doctor  
 Major: Law  
 Lawyering (Year) LAW-LW 10687 2.5 CR  
 Instructor: Anna Arons  
 Torts LAW-LW 11275 4.0 A-  
 Instructor: Cynthia L Estlund  
 Procedure LAW-LW 11650 5.0 A  
 Instructor: Jonah B Gelbach  
 Contracts LAW-LW 11672 4.0 A  
 Instructor: Barry E Adler  
 1L Reading Group LAW-LW 12339 0.0 CR  
 Instructor: Helen Hershkoff  
 Current AHRS 15.5 EHRS 15.5  
 Cumulative 15.5 15.5

Current AHRS 13.0 EHRS 13.0  
 Cumulative 56.0 56.0  
 Allen Scholar-top 10% of students in the class after four semesters  
 Staff Editor - Annual Survey of American Law 2022-2023

End of School of Law Record

Spring 2022

School of Law  
 Juris Doctor  
 Major: Law  
 Property LAW-LW 10427 4.0 A  
 Instructor: Vicki L Been  
 Lawyering (Year) LAW-LW 10687 2.5 CR  
 Instructor: Anna Arons  
 Legislation and the Regulatory State LAW-LW 10925 4.0 A-  
 Instructor: Roderick M Hills  
 Criminal Law LAW-LW 11147 4.0 B  
 Instructor: Sheldon Andrew Evans  
 1L Reading Group LAW-LW 12339 0.0 CR  
 Instructor: Helen Hershkoff  
 Financial Concepts for Lawyers LAW-LW 12722 0.0 CR  
 Current AHRS 14.5 EHRS 14.5  
 Cumulative 30.0 30.0

Fall 2022

School of Law  
 Juris Doctor  
 Major: Law  
 Prosecution Externship - Eastern District LAW-LW 10103 3.0 CR  
 Instructor: Alixandra Smith  
 Erin Reid  
 Prosecution Externship - Eastern District Seminar LAW-LW 10355 2.0 A  
 Instructor: Alixandra Smith  
 Erin Reid  
 Complex Federal Investigations Seminar LAW-LW 11517 2.0 B-  
 Instructor: Katherine R Goldstein  
 Parvin Daphne Moyne  
 Evidence LAW-LW 11607 4.0 A-  
 Instructor: Erin Murphy  
 Antitrust: Merger Enforcement and Litigation Seminar LAW-LW 12723 2.0 B  
 Instructor: Joseph F. Tringali  
 Current AHRS 13.0 EHRS 13.0  
 Cumulative 43.0 43.0

Spring 2023

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW  
JD CLASS OF 2023 AND LATER & LLM STUDENTS

*I certify that this is a true and accurate representation of my NYU School of Law transcript.*

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

<b>First-Year JD (Mandatory)</b>	<b>All other JD and LLM (Non-Mandatory)</b>
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
<b>Maximum for A tier = 31%</b>	<b>Maximum for A tier = 31%</b>
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
<b>Maximum grades above B = 57%</b>	<b>Maximum grades above B = 57%</b>
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

<i>Pomeroy Scholar:</i>	Top ten students in the class after two semesters
<i>Butler Scholar:</i>	Top ten students in the class after four semesters
<i>Florence Allen Scholar:</i>	Top 10% of the class after four semesters
<i>Robert McKay Scholar:</i>	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

#### Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

#### Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021



PREET BHARARA  
*Distinguished Scholar in Residence*  
*Adjunct Professor of Law*

NYU School of Law  
40 Washington Square South  
New York, NY 10012

12 June, 2023

**RE: Justin Korman**

Dear Judge:

I write to recommend, enthusiastically, Justin Korman for a federal clerkship. He is smart, thoughtful, dedicated, and a fine writer. Based on his performance in my seminar, *The Elements of Criminal Justice*, at NYU Law School, I believe Justin would make an excellent law clerk.

In the seminar, which roughly tracks the arc of my book, *Doing Justice*, students examine and critique the process by which justice is done in federal criminal cases by tracing the four main stages of any criminal case—investigation, accusation, judgment, and punishment; as such, the seminar is about legal, ethical, and moral reasoning. Justin was an outstanding student, and he earned one of the very few A's in my class. In fact, all three of his papers earned an A.

Justin is a clear and rigorous writer, who analyzes legal and ethical issues with great focus and intelligence. In each of three assigned papers, he explored a thorny legal or ethical dilemma, deftly crystallizing and addressing issues that have no obvious or clear answers. In his final paper, he did a particularly fine job of assessing the propriety President Obama's commutation of Chelsea Manning's sentence. He was highly thoughtful in considering various factors and values and supported his conclusion with both nuance and rigor.

I am also impressed with Justin's commitment to public service. As you will see from his resume, he has found time to serve in three respected public prosecutor's offices – the New York Attorney General's Office, along with the U.S. Attorney's offices for Eastern District of New York and the Middle District of Pennsylvania.

Justin was among the most prolific participants in class discussion. From those discussions, I know him to be articulate, respectful, personable, spirited, and smart. He has a clear dedication to fairness and justice and the rule of law. I look forward to following his career in service to others. Based on all my dealings with Justin, I believe he would make a terrific judicial law clerk and would be a pleasure to have in chambers.

Respectfully,

/s/

Preet Bharara





**New York University**

*A private university in the public service*

School of Law

40 Washington Square South, 411K

New York, NY 10012-1099

Telephone: (212) 992-8907

Facsimile: (212) 995-4590

E-mail: samuel.rascoff@nyu.edu

**Samuel J. Rascoff**

*Professor of Law*

June 8, 2023

Dear Judge:

I tried to dissuade Justin Korman from applying for this clerkship :-)

The product of an upbringing in Western Pennsylvania, Justin (while smart as whip) exudes the gentle, polite demeanor of a non-native New Yorker. And so I gently probed to see if he might be open to an opportunity west of the Hudson.

Justin would not hear of it. In coming to NYU Law, Justin made clear to me, he consciously joined the ranks of New Yorkers by choice, the sort immortalized by EB White in his essay "Here is New York." And he has no intention of leaving any time soon.

And so, having failed at dissuading him, I will now try to persuade you to hire Justin. I hope to fare better at this. I have going for me that:

1. Justin is extraordinarily bright and perspicacious.
2. He wrote a first-rate essay in my intelligence law seminar on the Fourth Amendment status of pole cameras.
3. He regularly contributed to that same seminar with outstanding classroom interventions.
4. He has taken a host of interesting classes in, or adjacent to, federal criminal law and has developed the habit of earning many straight As in these (and other) classes.
5. He is wry and funny and a delight to talk to.

Justin is the sort of legal intellect and professional who will do first-rate work for you. And he has the sort of personality that will wear well in chambers.

When it comes to the responsibility that a clerkship entails Justin could, I am sure, make it anywhere. But I am just as confident that he can make it in old New York. Thank you for your consideration and do not hesitate to reach out to me if I can be of further assistance.

Sincerely,

Samuel J. Rascoff



**New York University**

*A private university in the public service*

School of Law

40 Washington Square South, 314H

New York, NY 10012-1099

Telephone: (212) 998-6223

Facsimile: (212) 995-4341

E-mail: vicki.been@nyu.edu

**Vicki L. Been**

*Judge Edward Weinfeld Professor of Law*

*Faculty Director, Furman Center for Real Estate and Urban Policy*

*Associated Professor of Public Policy at NYU's Robert F. Wagner Graduate School of Public Service*

June 12, 2023

**RE: Justin Korman, NYU Law '24**

Your Honor:

Justin Korman asked me to write to you about his qualifications to serve as your law clerk for the term beginning in the fall of 2024. I am delighted to do so, because I am confident that he will make a terrific clerk. He is bright, personable, hard-working and conscientious, and writes extremely well.

I first met Justin in my first year property course in the spring of 2022. Each time I called on him, Justin was unfailingly well-prepared and ready to jump into a conversation. His comments in class added significant depth to the discussion because he often saw connections between cases, or angles to arguments, that his peers had missed. His analysis was especially discerning, and reflected a keen intellect and deep intellectual curiosity. Justin was well-spoken and direct, and was always polite and respectful of others' arguments, but held his ground firmly and persuasively.

His exam in the course was beautifully written, logically organized, and spot on. Each answer cut quickly to the heart of a problem, and demonstrated substantial intellectual rigor and sharp analytic skills. Justin seems equally at home with legal doctrinal arguments and conceptual policy arguments. He sees the weaknesses of arguments on both sides of a debate, and is tenacious in working through the problems.

I thought so highly of Justin's performance in the property class that I asked him to serve as a research assistant. He was already fully committed to semester internships with the New York Attorney General and the United States Attorney's Office for the Eastern District of New York, so I missed the chance to work with him. I've followed his law school career, though, and have been particularly impressed by the leadership skills he's shown in making the Prosecution Legal Society a forum for students interested in pursuing careers in criminal prosecution (we have lots of programs for students interested in criminal defense, but often neglect those interested in prosecution).

**Justin Korman, NYU Law '24**

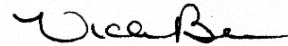
June 12, 2023

Page 2

I also found his draft of the paper I hope he'll publish as a journal note particularly strong. Justin's survey and critique of the emerging case law is engaging and a pleasure to read because he writes so clearly and concisely. Justin has a quiet modesty, an up-beat, even-keeled manner and a ready sense of humor. He shows excellent judgment, and is mature, level-headed, and dependable.

In short, Justin has the intelligence and superb communication skills a rigorous clerkship demands. He will make an excellent law clerk. I recommend him to you with great enthusiasm.

Sincerely,

A handwritten signature in black ink, appearing to read "Vicki Been", written over a light gray rectangular background.

Vicki Been



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES  
ATTORNEY GENERAL

DIVISION OF CRIMINAL JUSTICE  
PUBLIC INTEGRITY BUREAU

April 27, 2023

Your Honor:

My name is Russell Satin, Senior Counsel in the Public Integrity Bureau of the New York State Office of the Attorney General. I have had the pleasure of supervising Justin Korman during his 2023 Spring Externship in our bureau and highly recommend him for a clerkship position. His critical thinking and precise analysis allow him to perform exceptionally well in every task he is given, and these traits will be assets for him as a clerk.

During our time working together, Justin impressed me with his enthusiasm for public service and his commitment to always producing high quality work. Rather than simply complete assignments, Justin always shows a genuine interest in the overall success of each case and is continuously asking questions and probing for more information. His ceaseless pursuit of answers and understanding demonstrates a quick legal mind and will serve him well in his career. Justin produced an excellent memo on a divisive legal topic pertaining to the constitutionality of long-term surveillance operations; he writes with clarity and a well-structured style.

As is clear from his resume and transcript, Justin is an intelligent young man who has sought out work experiences which will provide a wealth of knowledge for him to rely on moving forward. On a personal level, I found Justin to be a thoughtful and engaging individual to have in the office. Despite only being in the office two days each week, Justin ingratiated himself into the fabric of the bureau and appeared at ease in all settings, whether it be witness interviews or in court. I believe Justin is a great candidate for a clerkship position. He has the dedication and drive to meet and exceed your high standards, and the requisite skills to excel in this role. I recommend him without reservation.

I would be happy to discuss more of Justin's work or offer additional information. You can reach me at 212-416-8268 or [Russell.Satin@ag.ny.gov](mailto:Russell.Satin@ag.ny.gov).

Regards,

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Russell Satin, Esq.  
Senior Counsel, Public Integrity Bureau

## Embarrassing the Future: How Pole Cameras Threaten the Fourth Amendment

Justin Korman

### Introduction

“One day, in a not-so-distant future, millions of Americans may well wake up in a smart-home-dotted nation. As they walk out their front doors, cameras installed on nearby doorbells, vehicles, and municipal traffic lights will sense and record their movements, documenting their departure times, catching glimpses of their phone screens, and taking note of the people that accompany them. These future Americans will traverse their communities under the perpetual gaze of cameras.”<sup>1</sup>

In *Carpenter v. United States*, the Supreme Court held that the seizure of seven days of historical cell-site location information (CSLI), which maps a subscriber’s location as their smartphone connects to nearby cell towers, is a “search” under the Fourth Amendment.<sup>2</sup> The Court established that an individual has a legitimate privacy interest in the data, collected and aggregated by wireless carriers.<sup>3</sup> In turn, the government is barred from accessing a week’s worth or more of CSLI without a warrant.<sup>4</sup> *Carpenter* gave color to the “reasonable expectation of privacy” test promulgated in *Katz v. United States* and used by the Court to determine a search for over half a century.<sup>5</sup> *Carpenter* also refused to apply *Smith v. Maryland*’s third-party doctrine, which held that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”<sup>6</sup> The decision to limit law enforcement’s ability to use modern tracking technology has the potential to redefine prior Court precedent, expand privacy

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<sup>1</sup> *United States v. Tuggle*, 4 F.4th 505, 509 (7th Cir. 2021).

<sup>2</sup> *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

<sup>3</sup> *Id.* at 2217.

<sup>4</sup> *Id.* at 2221.

<sup>5</sup> *Katz v. United States*, 389 U. S. 347 (1967).

<sup>6</sup> *Smith v. Maryland*, 442 U.S. 735 (1979).

protections, and hamper criminal investigations. But Chief Justice Roberts, delivering the opinion of the Court, was careful to cabin *Carpenter*'s holding to the specific technology in the case, writing that "the Court must tread carefully in such cases, to ensure that we do not 'embarrass the future.'"<sup>7</sup>

This Paper examines the constitutionality of warrantless pole camera surveillance of a residence through the lenses of two federal circuit court cases: *United States v. Tuggle*, a unanimous Seventh Circuit holding that eighteen months of pole camera surveillance was not a search; and *United States v. Moore-Bush*, a fractured *en banc* First Circuit decision in which three judges found that eight months of such surveillance was a search. The Paper first summarizes the path to *Carpenter*, a brief tour of recent Fourth Amendment jurisprudence. It notes the Court's particular sensitivity to the evolution of technology, and how that sensitivity permeated the *Katz* test and the third-party doctrine. The Paper then distills the factors the Court relied on in establishing a privacy interest in CSLI, highlights post-*Carpenter* pole camera jurisprudence, and assesses how the *Tuggle* court and the *Moore-Bush* judges applied the *Carpenter* factors to pole camera surveillance. Finally, the Paper dissects the common thread running through *Carpenter*, *Tuggle* and *Moore-Bush*: judicial fears about a burgeoning surveillance state.

### From *Katz* To *Carpenter*

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."<sup>8</sup> In 1967, the Court held in *Katz v. United States* that government agents listening to a conversation that occurred in a

<sup>7</sup> *Carpenter*, 138 S. Ct. at 2220 (quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292, 300 (1944)).

<sup>8</sup> U.S. CONST. amend. IV.

closed telephone booth conducted a search under the Fourth Amendment, unreasonable because it was done without a warrant.<sup>9</sup> The Court announced that “what [an individual] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”<sup>10</sup> Justice John M. Harlan II wrote in concurrence that Katz had a “a reasonable expectation of privacy” in his phone booth conversations.<sup>11</sup> The Court adopted the “reasonable expectation of privacy” test a year later.<sup>12</sup>

The test has been shaped by advances in surveillance technology. In *Kyllo v. United States*, the Court ruled that the thermal imaging of a residence was a Fourth Amendment search, despite the fact that the images were obtained by police officers standing on a public street.<sup>13</sup> The Court warned that “a mechanical interpretation of the Fourth Amendment [...] would leave the homeowner at the mercy of advancing technology.”<sup>14</sup> Even when sanctioning law enforcement practices, the Court retained a healthy skepticism of technology. In *United States v. Knotts*, the Court held that the limited use of a radio transmitter to track a defendant’s car was not a Fourth Amendment search.<sup>15</sup> But the court left the question open as to the constitutionality of round-the-clock electronic surveillance, at that time theoretical.<sup>16</sup> Less than thirty years later that surveillance became a reality, but the question was sidestepped again in *United States v. Jones*.<sup>17</sup>

<sup>9</sup> *Katz*, 389 U.S. 347.

<sup>10</sup> *Id.* at 351.

<sup>11</sup> *Id.* at 360 (Harlan, J., concurring).

<sup>12</sup> *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (“[W]herever an individual may harbor a reasonable ‘expectation of privacy,’ he is entitled to be free from unreasonable governmental intrusion.” (citation omitted)).

<sup>13</sup> *Kyllo v. United States*, 533 U.S. 27 (2001).

<sup>14</sup> *Id.* at 35.

<sup>15</sup> *United States v. Knotts*, 460 U.S. 276 (1983).

<sup>16</sup> *Id.* at 283-84 (“Respondent does not actually quarrel with this analysis, though he expresses the generalized view that the result of the holding sought by the Government would be that ‘twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision.’ But the fact is that the ‘reality hardly suggests abuse’; if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.” (citations omitted)).

<sup>17</sup> *United States v. Jones*, 565 U.S. 400 (2012).

The Court held that the use of a Global Positioning System (GPS) device to track a vehicle was unconstitutional not for failing the *Katz* test, but because police committed a physical trespass in installing the device.<sup>18</sup> However, four justices agreed in concurrence that longer-term GPS monitoring likely violated reasonable expectations of privacy, regardless of a physical trespass.<sup>19</sup> Justice Alito foreshadowed that “technology can change [reasonable privacy] expectations.”<sup>20</sup>

The third-party doctrine also showed vulnerability to technological advances. In 1977, the Court held in *United States v. Miller* that a depositor did not have a reasonable expectation of privacy in financial statements and deposit slips, subpoenaed from his bank by the government.<sup>21</sup> The Court determined that information revealed to a third party, even on the assumption that it will be safeguarded, is not protected by the Fourth Amendment.<sup>22</sup> In dissent, Justice Brennan criticized the Court’s reliance on third-party disclosure, writing that “[f]or all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account.”<sup>23</sup> Nevertheless, the Court continued to extend the doctrine, upholding the constitutionality of pen registers in *Smith v. Maryland* on the basis that callers “assume the risk” that numbers they dial may be shared with law enforcement.<sup>24</sup> Justice Marshall lamented in dissent that individuals “have no realistic alternative” to using the telephone, and

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 415 (Sotomayor, J., concurring); *Id.* at 430 (Alito, J., joined by Ginsburg, Breyer, and Kagan, JJ., concurring).

<sup>20</sup> *Id.* at 427 (Alito, J., concurring).

<sup>21</sup> *United States v. Miller*, 425 U.S. 435 (1976).

<sup>22</sup> *Id.* at 443.

<sup>23</sup> *Id.* at 451 (Brennan, J., dissenting).

<sup>24</sup> *Smith v. Maryland*, 442 U.S. 735, 745 (1979).



“unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance.”<sup>25</sup>

### The Carpenter Factors

In 2011, authorities zeroed in on Timothy Carpenter as a suspect in a series of Detroit-area robberies.<sup>26</sup> Federal prosecutors obtained Carpenter’s CSLI from wireless carriers MetroPCS and Sprint, pursuant to a court order under the Stored Communications Act.<sup>27</sup> Unlike the probable cause required for a warrant, the Stored Communications Act merely requires prosecutors to show that the information sought “might be pertinent to an ongoing investigation.”<sup>28</sup> Carpenter’s CSLI generated 12,898 location points over 127 days; 101 points per day generated each time Carpenter received a call, text, or email, and when the phone automatically connected to a nearby cell tower to update news, weather, or social media feeds.<sup>29</sup> Using the location data, authorities generated maps that pinpointed Carpenter’s phone at the scene of four robberies.<sup>30</sup> Carpenter was arrested and subsequently convicted on charges of robbery and carrying a firearm during a federal crime of violence.<sup>31</sup> Prosecutors said the incriminating CSLI “clinched the case.”<sup>32</sup> Carpenter had moved prior to trial to suppress the CSLI evidence on Fourth Amendment grounds, but his motion was denied by the district court.<sup>33</sup> The denial was affirmed by the Sixth Circuit, and the Supreme Court granted certiorari.<sup>34</sup>

<sup>25</sup> *Id.* at 750 (Marshall, J., dissenting).

<sup>26</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2212 (2018).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 2208.

<sup>29</sup> *Id.* at 2220.

<sup>30</sup> *Id.* at 2212-13.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2213.

<sup>33</sup> *Id.* at 2212.

<sup>34</sup> *Id.* at 2213.

The Court held that Carpenter had a reasonable expectation of privacy in his CSLI, meaning the government conducted a Fourth Amendment search by acquiring the records.<sup>35</sup> Since the government proceeded without a warrant supported by probable cause, the Court said, the search was unconstitutional.<sup>36</sup> Notably, the Court refused to apply the third-party doctrine, despite the fact that the records were kept by MetroPCS and Sprint, not Carpenter himself.<sup>37</sup> The Court did not announce a new test to replace *Katz*, but announced the factors that guided its inquiry: “[1] the deeply revealing nature of CSLI, [2] its depth [and] breadth, and [3] comprehensive reach, and the [4] inescapable and [5] automatic nature of its collection.”<sup>38</sup>

The first factor, “the deeply revealing nature of CSLI,” counseled in favor of a privacy interest because cell phones follow users through “private residences, doctor’s offices, political headquarters, and other potentially revealing locales,” divulging “familial, political, professional, religious, and sexual associations.”<sup>39</sup> The second factor, the “depth [and] breadth” of CSLI, endangered privacy because the technology maps location at near “GPS-level precision,” location data is comprehensive for many individuals who “compulsively carry cell phones with them all the time,” and wireless carriers maintain up to five years of CSLI records for the government to access retrospectively.<sup>40</sup> And the third factor, the “comprehensive reach of CSLI,” moved the Court because the data is collected on 400 million phones by carriers, so police can acquire records on anyone at little expense.<sup>41</sup>

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<sup>35</sup> *Id.* at 2217.

<sup>36</sup> *Id.* at 2221.

<sup>37</sup> *Id.* at 2217 (“We decline to extend *Smith* and *Miller* to cover these novel circumstances.”).

<sup>38</sup> *Id.* at 2223.

<sup>39</sup> *Id.* at 2217-18.

<sup>40</sup> *Id.* at 2218-19.

<sup>41</sup> *Id.* at 2233.

The final two factors foreclosed the application of the third-party doctrine. The fourth factor, the “inescapable” nature of the data, warranted an exception because carrying a cell phone is “indispensable to participation in modern society,” so individuals can’t feasibly opt-out from collection.<sup>42</sup> Finally, the fifth factor, the “automatic” nature of the data, made CSLI unique because data points were generated “without any affirmative act on the part of the user beyond powering up,” merely from the phone being connected to the wireless network.<sup>43</sup> The factors together comprised a lack of “voluntary exposure,” necessary to apply the doctrine.<sup>44</sup>

The Court, perhaps wary of the broader application of *Carpenter*, expressly limited its holding to CSLI, reserving questions of conventional surveillance techniques.<sup>45</sup> But the *Carpenter* framework can be (and already has been) applied beyond CSLI, by state and appellate courts nationwide. The Court has remained silent on these matters, while surveillance has continued and evolved.

#### Tuggle and Moore-Bush: The Facts

In July of 2021, the Court of Appeals for the Seventh Circuit held that eighteenth months of warrantless pole camera surveillance of a residence was not a Fourth Amendment search.<sup>46</sup> In August of 2014, government agents installed a pole camera in front of the home of Travis Tuggle, a suspected conspirator in a large methamphetamine distribution scheme.<sup>47</sup> Two more cameras were installed in 2015.<sup>48</sup> Incriminating footage supported Tuggle’s indictment on

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<sup>42</sup> *Id.* at 2220.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *United States v. Tuggle*, 4 F.4th 505 (7th Cir. 2021).

<sup>47</sup> *Id.* at 511.

<sup>48</sup> *Id.*

distribution charges and the cameras were removed in March of 2016.<sup>49</sup> Before the case was appealed to the circuit court, the district court denied Tuggle’s motion to suppress the pole camera evidence.<sup>50</sup> Judges Joel M. Flaum, David F. Hamilton, and Michael B. Brennan unanimously affirmed the district court’s denial.<sup>51</sup>

Almost a year later in June of 2022, the Court of Appeals for the First Circuit sitting *en banc* deadlocked 3-3 on the issue of whether eight-month residential pole camera surveillance constituted a search under the Fourth Amendment.<sup>52</sup> Three judges, David J. Barron, John M. Thompson, and William J. Kayatta, concluded that the *Carpenter* factors justified a reasonable expectation of privacy “in the whole of the activities in the front curtilage of a home,” prohibiting warrantless long-term surveillance.<sup>53</sup>

In May of 2017, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) installed a video camera on a utility pole across the street from the residence of their target, Daphne Moore-Bush, whom they suspected was trafficking in narcotics.<sup>54</sup> The government acted without probable cause or even a reasonable suspicion that a crime had been committed.<sup>55</sup> The camera captured “roughly half” of the home, including a side entrance and the front driveway, and it could be remotely zoomed, panned, and tilted.<sup>56</sup> In January of 2018, Ms. Moore-Bush and

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<sup>49</sup> *Id.* at 511-12.

<sup>50</sup> *Id.* at 512.

<sup>51</sup> *Id.* at 511.

<sup>52</sup> *United States v. Moore-Bush*, 36 F.4th 320 (1st Cir. 2022).

<sup>53</sup> *Id.* at 340 (Barron, C.J., joined by Thompson & Kayatta, JJ., concurring). This aligns with the only state supreme court to address the issue post-*Carpenter*. In *People v. Tafoya*, the Colorado Supreme Court held that three months of pole camera surveillance was a search under the Fourth Amendment. The court found that the surveillance was as intrusive as accessing CSLI data, if not more so. And the court noted that since pole cameras are “cheap and surreptitious,” their abuse goes unchecked by limited resources and community hostility. *People v. Tafoya*, 494 P.3d 613 (2021).

<sup>54</sup> *Moore-Bush*, 36 F.4th at 322.

<sup>55</sup> *Id.* at 324.

<sup>56</sup> *Id.* at 323.

her mother (another resident and the owner of the house) were indicted for drug crimes and the camera was removed.<sup>57</sup> The defendants subsequently moved to suppress the footage on Fourth Amendment grounds.<sup>58</sup> The district court granted their motions, but a First Circuit panel reversed before the circuit agreed to rehear the case *en banc*.<sup>59</sup> All six judges agreed to deny the motion to suppress.<sup>60</sup> Judges Barron, Thompson, and Kayatta applied the good-faith exception to the Fourth Amendment's warrant requirement, reasoning that the government relied on pre-*Carpenter* circuit precedent authorizing the warrantless surveillance.<sup>61</sup> However, they analyzed the case in light of *Carpenter* and found, unlike their three colleagues, that the government conducted a search under the Fourth Amendment.<sup>62</sup>

In *Tuggle*, the judges quickly determined that the isolated use of pole cameras violated no privacy right and moved on to the “more challenging question,” which was the long-term nature of the surveillance capturing Tuggle's activities in aggregate.<sup>63</sup> Despite reservations, the judges similarly found no unconstitutional search in the prolonged surveillance, articulating that the revealing nature, as well as the depth and breadth of the surveillance, did not reach the *Carpenter* threshold.<sup>64</sup> They admitted the comprehensive reach of the technology, but distinguished it from CSLI and questioned the application of *Carpenter* to the case.<sup>65</sup> Conversely, the *Moore-Bush* judges found that the deeply revealing nature of the curtilage activities, the depth and breadth of the eight months of footage, and the comprehensive reach of pole camera surveillance all

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<sup>57</sup> *Id.* at 323-24.

<sup>58</sup> *Id.* at 324.

<sup>59</sup> *Id.* at 325-27.

<sup>60</sup> *Id.* at 320.

<sup>61</sup> *Id.* at 359-60.

<sup>62</sup> *Id.* at 359.

<sup>63</sup> *United States v. Tuggle*, 4 F.4th 505, 517 (7th Cir. 2021).

<sup>64</sup> *Id.* at 524.

<sup>65</sup> *Id.* at 525, 527.

legitimated a privacy interest.<sup>66</sup> Despite the inapplicability of the third-party doctrine, they also gave weight to the inescapable nature of the collection.<sup>67</sup>

### Applying the *Carpenter* Factors

*Tuggle* and the *Moore-Bush* concurrence reach opposite conclusions within the same structure of the *Carpenter* factors. Each factor can be used to reconcile pole camera footage with CSLI, or provide support for why the footage should be classified differently. *Tuggle* focused on what pole cameras do not see, the gaps in surveillance when the target travels that are filled in by location data. *Moore-Bush* emphasized what pole cameras see clearer and for a longer period of time than seven days of CSLI.

On one hand, pole camera footage is less revealing than *Carpenter* in that it captures no record of the target’s movements, both public and private, that are implicated in CSLI.<sup>68</sup> The cameras, located across the street from a residence, never see the businesses where the target shops, the houses of friends that he visits, or his public routines.<sup>69</sup> In contrast with CSLI, which shows every movement, investigators can only infer the target’s lack of movement from the pole camera footage.<sup>70</sup> The activity in front of the home is an “important sliver of [the target’s] life” but “pales in comparison” to *Carpenter*.<sup>71</sup>

On the other hand, the footage is deeply revealing because the surveillance targets the home, the “center of our lives” and the bedrock of Fourth Amendment protection.<sup>72</sup> “[I]t is where

<sup>66</sup> *Moore-Bush*, 36 F.4th at 340-41, 346, 347.

<sup>67</sup> *Id.* at 347.

<sup>68</sup> *Tuggle*, 4 F.4th at 524.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *United States v. Moore-Bush*, 36 F.4th 320, 346 (1st Cir. 2022).

we always return to, where our friends, family, and associates visit, where we receive packages and mail, and where we spend a good deal of time.”<sup>73</sup> Pole camera surveillance can reveal more about the “familial, political, professional, religious, and sexual associations” cited in *Carpenter* than CSLI.<sup>74</sup> Unlike location data, pole cameras capture the target hosting controversial guests, like members of unpopular political parties or religious figures.<sup>75</sup> The “mosaic theory” of privacy, that a reasonable privacy interest in the aggregate can exist despite no privacy interest in a moment, hour, or even day of surveillance, was embraced by *Carpenter*.<sup>76</sup> Pole cameras see the life of a target, the aggregation of experiences – “from a parting kiss to a teary reunion to those moments most likely to cause shame” – as well as patterns of behavior left undiscovered by shorter-term surveillance.<sup>77</sup>

The breadth of the surveillance, while concerning, violates no line established by precedent or by Congress.<sup>78</sup> More importantly, the footage has limited depth because the immobile cameras lose track of the target every time he leaves his property.<sup>79</sup> It lacks the comprehensiveness of the CSLI data, where a phone functions as “an ankle monitor” never leaving the body of the target.<sup>80</sup> But the breadth of the surveillance is still self-evident: it continues for months, while the holding in *Carpenter* found a privacy interest in just seven days of CSLI.<sup>81</sup> The depth of the surveillance exists in live images as opposed to “a dot on a map

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (citing *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018)).

<sup>75</sup> *Id.* at 337.

<sup>76</sup> *Id.* at 358. The *Tuggle* court did not believe they were bound to apply the mosaic theory, but analyzed *Tuggle*’s claim under the mosaic theory anyway and found no search. *Tuggle*, 4 F.4th at 517, 523.

<sup>77</sup> *Id.* at 336.

<sup>78</sup> *United States v. Tuggle*, 4 F.4th 505, 526 (7th Cir. 2021). The judges also refused to set the boundaries themselves. “Drawing our own line, however, risks violating Supreme Court precedent and interfering with Congress’s policy-making function, which would exceed our mandate to apply the law.” *Id.*

<sup>79</sup> *Id.* at 524-25.

<sup>80</sup> *Id.* at 524 (quoting *Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018)).

<sup>81</sup> *Carpenter*, 138 S. Ct. at 2217 n.3.

[revealed by CSLI],” as well as in the accuracy of a comprehensive digital record that can be “mined” using visual search technologies like facial recognition to reveal even more information.<sup>82</sup>

The comprehensive reach of the technology lacks a retrospective quality arguably necessary to justify cabinining its use.<sup>83</sup> The existing trove of CSLI collected and stored by wireless providers allows the government to “travel back in time” to surveil anyone, while investigators need to select each target *ex ante* before installing pole cameras.<sup>84</sup> The retrospectivity, not the hypothetical inability of police to replicate the surveillance by engaging in lengthy stakeouts, guided the Court’s inquiry in *Carpenter*.<sup>85</sup>

But that inability underscores the potential of the technology to violate privacy. The analog to a pole camera is a team of officers conducting a round-the-clock stakeout, which rarely lasts longer than three weeks because it is laborious, expensive, and detectable.<sup>86</sup> But installing and monitoring the pole camera is cheap, efficient, and surreptitious.<sup>87</sup> The gulf between what surveillance is possible with this technology and what is possible without it is wider than in *Carpenter*.<sup>88</sup> With no legal preconditions to installation, the government can amass “a database containing continuous video footage of every home in a neighborhood, or for that matter, in the United States as a whole.”<sup>89</sup>

<sup>82</sup> *Moore-Bush*, 36 F.4th at 341, 346, 347.

<sup>83</sup> *Tuggle*, 4 F.4th at 525.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 526 (“To assume that the government would, or even could, allocate thousands of hours of labor and thousands of dollars to station agents atop three telephone poles to constantly monitor Tuggle’s home for eighteen months defies the reasonable limits of human nature and finite resources.”)

<sup>86</sup> *Moore-Bush*, 36 F.4th at 333-34.

<sup>87</sup> *Id.* at 341, 347.

<sup>88</sup> *Id.* at 344.

<sup>89</sup> *Id.* at 340.



Finally, the underlying conduct surveilled – entering and leaving a residence – is inescapable. Third-party doctrine does not apply to pole camera surveillance.<sup>90</sup> But substituting the public view as third-party proxy, there is no way to avoid disclosure beyond either “never leaving the house or enclosing the curtilage to make it effectively part of the inside of the house,” both equally as unreasonable as not using a cell phone that compiles CSLI.<sup>91</sup> Even with financial resources, lesser countermeasures like a privacy fence or shrubbery only invite the government to raise the height of the camera.<sup>92</sup> The inescapability of pole camera surveillance is central to a vision of all-encompassing government surveillance, and applying it outside the context of third-party cases could be a way to head off particularly unsavory government tools that threaten a broader concept of liberty motivating the Fourth Amendment.

### The Spectre of the Orwellian State

Outside of the purely legal realm, warrantless pole camera surveillance implicates important ethical and practical considerations. According to the *Carpenter* Court, the Framers of the Constitution drafted the Fourth Amendment “to place obstacles in the way of a too permeating police surveillance.”<sup>93</sup> A warrant is the highest hurdle, the “ultimate measure of the constitutionality of a governmental search.”<sup>94</sup> Having concluded that accessing the defendant’s CSLI was a search in *Carpenter*, the Court also found that the government did not meet its evidentiary burden in order to obtain a valid warrant.<sup>95</sup> To get a warrant, the government would

<sup>90</sup> *Id.* at 344. The *Tuggle* court does not discuss the factors of inescapable or automatic disclosure, presumably cabining them to third-party cases.

<sup>91</sup> *Id.* at 347.

<sup>92</sup> *Id.* (“[T]he saying, ‘show me a wall and I’ll show you a ladder’ comes to mind.”).

<sup>93</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 2221.

have been required to show “probable cause,” by no means a fixed target, but one that generally involves “some quantum of individualized suspicion.”<sup>96</sup>

The *Tuggle* court did “sound a note of caution” regarding the potential of technological innovation to undermine Fourth Amendment protections.<sup>97</sup> Cameras did not exist to the Framers, but now they are so pervasive that no one blinks when the government uses them to solve crimes.<sup>98</sup> That shift in societal expectations “sparks the promethean fire,” licensing the government to avoid constitutional accountability.<sup>99</sup> But the *Tuggle* court’s understanding of precedent bound them to sanction the practice and defer to the Supreme Court and Congress in restoring privacy protections.<sup>100</sup> Courts confronting the constitutionality of long-term pole camera surveillance of a residence have repeatedly invoked the danger of mass surveillance unconstrained by probable cause or individualized suspicion. Judicial inaction “unlocks the gate to a true surveillance society,”<sup>101</sup> “transform[s] what once seemed like science fiction into fact,”<sup>102</sup> and “raises the spectre of the Orwellian state.”<sup>103</sup>

The ghost of China, deemed by the intelligence community to be America’s greatest threat, likely comes to mind.<sup>104</sup> The judges in *Moore-Bush* quoted a *New York Times* article detailing the Chinese surveillance apparatus, “a blueprint for how to build a digital totalitarian

<sup>96</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976).

<sup>97</sup> *United States v. Tuggle*, 4 F.4th 505, 527 (7th Cir. 2021).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 528.

<sup>101</sup> *State v. Jones*, 903 N.W.2d 101, 112 (2017).

<sup>102</sup> *Tuggle*, 4 F.4th at 509.

<sup>103</sup> *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987).

<sup>104</sup> Julian E. Barnes & Edward Wong, *U.S. Spy Agencies Warn of China’s Efforts to Expand Its Power*, N.Y. TIMES (Mar. 8, 2023), <https://www.nytimes.com/2023/03/08/us/politics/china-us-intelligence-report.html> (“The People’s Republic of China, which is increasingly challenging the United States economically, technologically, politically and militarily around the world, remains our unparalleled priority,” [Director of National Intelligence Avril] Haines said.).

state.”<sup>105</sup> In provinces like Zhengzhou, Guizhou, Zhejiang, and Henan, facial scans on apartment doors have replaced key cards.<sup>106</sup> Police use thousands of cameras to track the location of Hong Kong sympathizers, migrant workers, ethnic minorities, and the mentally ill.<sup>107</sup> Criminal investigation has never been easier in China but abuse is rampant when, as one Chinese citizen put it, “[l]aw-enforcement officers of low moral stock have high-tech weapons.”

The same high-tech weapons operate in the hands of allies, who are weighing how to deploy them without sacrificing democratic ideals of freedom and privacy. London, England has more closed-circuit television cameras than any other city except Beijing, but privacy groups see a lack of accountability in how the technology is used and shared.<sup>108</sup> Japan’s electronic surveillance infrastructure is tracking people with dementia to save lives and give families peace of mind, but even proponents worry about the government tracking all of its “problem people.”<sup>109</sup> The United States is having the same debates amidst a rise in surveillance, illustrated by several notable examples in local law enforcement. In 2016, Baltimore police used aerial surveillance planes to survey neighborhoods and monitor signs of civil unrest in the wake of Freddie Gray’s death.<sup>110</sup> In 2019, Amazon’s doorbell camera company Ring partnered with over 400 law enforcement agencies to facilitate access to user footage.<sup>111</sup> Ring gave police

<sup>105</sup> Paul Mozur & Aaron Krolak, *A Surveillance Net Blankets China’s Cities, Giving Police Vast Powers*, N.Y. TIMES (Dec. 17, 2019), <https://www.nytimes.com/2019/12/17/technology/china-surveillance.html>.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Adam Satariano, *Real-Time Surveillance Will Test the British Tolerance for Cameras*, N.Y. TIMES (Sep. 17, 2019), <https://www.nytimes.com/2019/09/15/technology/britain-surveillance-privacy.html>.

<sup>109</sup> Ben Dooley & Hisako Ueno, *Where a Thousand Digital Eyes Keep Watch Over the Elderly*, N.Y. TIMES (Feb. 2, 2022), <https://www.nytimes.com/2022/02/02/business/japan-elderly-surveillance.html>.

<sup>110</sup> Kris Van Cleave, *Big Brother? U.S. company’s aerial surveillance technology raises questions*, C.B.S. NEWS (Aug. 24, 2016), <https://www.cbsnews.com/news/persistent-surveillance-systems-aerial-surveillance-technology-raises-questions/>.

<sup>111</sup> Caroline Haskins, *Everything You Need to Know About Ring, Amazon’s Surveillance Camera Company*, VICE (Aug. 8, 2019), <https://www.vice.com/en/article/qvg48d/everything-you-need-to-know-about-ring-amazons-surveillance-camera-company>.

departments free cameras to distribute in their communities and taught officers how to persuade citizens to give them access to their video feeds.<sup>112</sup> Later in 2019, the Detroit housing authority installed cameras in front of entryways to public housing units in a collaboration with police.<sup>113</sup> Detroit police, like their Chinese counterparts, utilized facial recognition software to identify individuals at the residences.<sup>114</sup> In response to the threat posed, multiple cities have banned facial recognition software, wary that Big Brother is spying on the innocent.<sup>115</sup> As the home, “first among equals” in deserving Fourth Amendment protection, is being watched, judges have to tackle concerns about an imbalance between security and liberty.<sup>116</sup> They also need to consider another essential question: who is watching?

That answer implicates China as well. The Chinese government has been accused of hijacking cameras to monitor the United States. In 2019, the U.S. intelligence community determined their counterparts in Beijing were likely hacking Chinese-made Huawei cameras, installed on American cell towers to monitor traffic and weather but incidentally providing a view of U.S. military bases and missile silos.<sup>117</sup> Hikvision, another Chinese company bankrolled by Xi Jinping’s government, supplied cameras to police departments in Tennessee, Peterson Air Force Base in Colorado, and U.S. embassies abroad.<sup>118</sup> A 2021 search determined Hikvision, whose motto is “See far, go further,” had 750,000 internet-connected cameras active in the United States, two years after President Trump signed a law prohibiting federal agencies from

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<sup>112</sup> *Id.*

<sup>113</sup> Lola Fadulu, *Facial Recognition Technology in Public Housing Prompts Backlash*, N.Y. TIMES (Sep. 24, 2019), <https://www.nytimes.com/2019/09/24/us/politics/facial-recognition-technology-housing.html>.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

<sup>117</sup> Katie Bo Lillis, *CNN Exclusive: FBI investigation determined Chinese-made Huawei equipment could disrupt US nuclear arsenal communications*, CNN (Jul. 25, 2022), <https://www.cnn.com/2022/07/23/politics/fbi-investigation-huawei-china-defense-department-communications-nuclear/index.html>.

<sup>118</sup> Jonathan Hillman, *China Is Watching You*, THE ATLANTIC (Oct. 18, 2021), <https://www.theatlantic.com/ideas/archive/2021/10/china-america-surveillance-hikvision/620404/>.

contracting with the company.<sup>119</sup> The notion that the cameras helping police solve crimes in Lawrence, Massachusetts, are the same cameras facilitating the crackdown against Muslim Uyghurs in Xinjiang is an uncomfortable commonality and a grave national security concern.<sup>120</sup> The construction of the American surveillance state in a connected world means that citizens and judges willing to trust authorities in wielding the weapons also need to trust that the weapons are secure from other prying eyes. That is a considerable leap of faith, especially considering the cost-conscious security tradeoffs the government has already made.

### Conclusion

The *Carpenter* decision was a manifestation of judicial discomfort with the rapid evolution of surveillance technology. *Carpenter* retrofitted the *Katz* test to account for technological advances in cell phone tracking data without making an overbroad ruling about other methods of surveillance. Pole cameras are the next Fourth Amendment battleground, and *Tuggle* and *Moore-Bush* demonstrate both the potential and the limitations of the *Carpenter* framework in curbing other forms of technology-aided surveillance. *Tuggle* shows how *Carpenter* could be circumscribed to tracking technology, retrospective data collection, or cases that involve third-party disclosure. The *Moore-Bush* concurrence presents *Carpenter* as a holistic inquiry skeptical of any technology that contravenes traditional expectations of privacy.

A common motif shared by *Carpenter*, *Tuggle*, and *Moore-Bush* is a fear of the surveillance state. An American surveillance state threatens liberty, warranting uncomfortable comparisons to autocratic regimes like China. It also concentrates power in a way that can be exploited to threaten the safety of Americans, even if the government builds the network with

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

good intentions. The courts see themselves as the stewards of the spirit of the Fourth Amendment, the last barricade against *Minority Report*-esque policing after citizens grow tolerant of, or perhaps even comfortable with, the government's effective methods.

Both *Tuggle* and *Moore-Bush* say little about the Court's fear of embarrassing the future, and more about the potential for the Court to be embarrassed by the future. They warn that judicial inaction will not slow the proliferation of pole cameras or the maturation of the technology. Citizens may accept the reality of continuous surveillance once they step outside their front door, but the Supreme Court cannot punt on ideological and pragmatic questions that need to be answered before pole cameras become ubiquitous in American society. Until a pole camera case is granted certiorari, lower courts will continue to read the tea leaves of *Carpenter* while the surveillance state expands in the background.